

# Exhibit A



OMAR GONZALEZ-PAGAN, STAFF ATTORNEY  
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April 27, 2018

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED**  
**VIA ELECTRONIC MAIL**

Freedom of Information Officer  
U.S. Department of Health and Human Services  
Hubert H. Humphrey Building, Room 729H  
200 Independence Avenue, SW  
Washington, D.C. 20201  
[FOIARequest@hhs.gov](mailto:FOIARequest@hhs.gov)

Hugh Gilmore  
Freedom of Information Officer  
Centers for Medicare & Medicaid Services  
North Building, Room N2-20-06  
7500 Security Boulevard  
Baltimore, MD 21244  
[FOIA\\_Request@cms.hhs.gov](mailto:FOIA_Request@cms.hhs.gov)  
[hugh.gilmore@cms.hhs.gov](mailto:hugh.gilmore@cms.hhs.gov)

Re: **Freedom of Information Act Request**

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the implementing regulations for the Department of Health and Human Services (HHS), 45 C.F.R. Part 5, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) makes the following request for records.

**Requested Records**

Lambda Legal requests that HHS and its component, the Centers for Medicare & Medicaid Services (CMS), produce the following within twenty business days of this request:

1. Any records that mention, discuss, reference, or relate to HHS’s decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status in any part or aspect of any Medicare or Medicaid program, plan, policy, contract, accreditation process, provider, facility, or service.

2. Any records that mention, discuss, reference, or relate to HHS's decision about whether to post, publish, or enforce a rule or regulation, whether proposed or final, prohibiting discrimination on the basis of sex, sexual orientation, gender identity, gender expression, sex stereotypes, or transgender status against HHS employees, staff, contractors, or subcontractors, including with regards to access to restrooms or other sex-designated facilities.
3. Any records that mention, discuss, reference, or relate to HHS's decision regarding whether to publish in the Federal Register, or any other manner, a rule or regulation signed prior to January 20, 2017, but that has since not been published.
4. Any records that mention, discuss, reference, or relate to any proposed rule or regulation that was signed on January 19, 2017 but that has not published in the Federal Register.

We request that you produce responsive materials from June 1, 2016, through the date your search is conducted.

In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If HHS uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

Lambda Legal seeks all responsive records regardless of format, medium, or physical characteristics. In conducting your search, please understand the terms "record," "document," and "information" in their broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs. Records include but are not limited to memoranda, planning documents, statements, reports, studies, handwritten notes, budget documents, publications, working papers, letters, facsimiles, emails, text messages, messages on messaging platforms (such as Slack, GChat, and WhatsApp), telephone call logs, calendar invitations/entries, meeting notices, meeting agendas, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request includes any attachments to these records. **No category of material should be omitted from search, collection, and production.**

Please search all records regarding agency business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.<sup>1</sup> **It is not adequate to rely on policies and procedures that**

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<sup>1</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149—50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955—56 (D.C. Cir. 2016).

**require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.<sup>2</sup>**

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered HHS’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.<sup>3</sup> Furthermore, agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but HHS’s archiving tools would capture that email under Capstone. Accordingly, we insist that HHS use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. We are available to work with you to craft appropriate search terms. However, custodian searches are still required, as agencies may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>4</sup> If it is your position that any portion of the requested records is exempt from disclosure, we request that you provide an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). As you are aware, a *Vaughn* index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”<sup>5</sup> Moreover, the *Vaughn* index “must describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of disclosing the sought-after

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<sup>2</sup> See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)).

<sup>3</sup> Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidentialmemorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

<sup>4</sup> FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185).

<sup>5</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

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information.”<sup>6</sup> Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”<sup>7</sup>

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.<sup>8</sup> Claims of nonsegregability must be made with the same degree of detail as required for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

**You should institute a preservation hold on information responsive to this request.** We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, HHS is on notice that litigation is reasonably foreseeable.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, we welcome an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, we can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to Attn: Erin Kelley, Lambda Legal, 120 Wall Street, 19th Floor, New York, NY 10005. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis.

### **Background of Request**

On January 18, 2018, HHS announced the creation of a new “Conscience and Religious Freedom Division” (“Division”) within its Office for Civil Rights (“OCR”). The stated purpose of the new division is to “vigorously and effectively” enforce laws to protect “the rights of conscience and religious freedom” in the provision of health and human services.<sup>9</sup> The next day, the Division announced a new proposed rule (the “Proposed Rule”) to protect healthcare providers involved in HHS-funded programs from being “coerced into participating in activities that violate their

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<sup>6</sup> *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

<sup>7</sup> *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

<sup>8</sup> *Mead Data Central*, 566 F.2d at 261.

<sup>9</sup> See *HHS Announces New Conscience and Religious Freedom Division*, HHS.GOV (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

consciences, such as abortion, sterilization, or assisted suicide.”<sup>10</sup> Medical researchers have warned that the new Division and Proposed Rule could reverse the advances that have only recently been made in improving health outcomes for LGBTQ individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”<sup>11</sup>

In addition, reports indicate that upon taking office, President Trump “swiftly froze a series of LGBT-friendly rules, including proposed new regulations to further ban discrimination in Medicare and Medicaid. A regulation that would have allowed transgender HHS staff more protections when using the department’s bathrooms and other facilities was ignored.”<sup>12</sup> According to one HHS staffer, the rule “was signed and technically finished on Jan. 19, 2017, but not posted online . . . And the new administration considered it unpublished and pulled it back.”<sup>13</sup>

Significantly, the Trump Administration has appointed several politically-prominent religious activists to positions of authority within HHS.<sup>14</sup> The public statements of these individuals evidences an unwillingness to enforce laws and protections on behalf of the LGBTQ community. Indeed, reports indicate that political appointees have overruled or completely sidelined career experts within HHS regarding decisions about controversial issues like reproductive or LGBTQ health care.<sup>15</sup>

The administration’s actions and the appointment of these activists to key positions within HHS have prompted alarm among health experts and advocates for the rights of LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other groups. Advocates and experts warn that the Division and the newly proposed rule will allow healthcare providers to harm, rather than help, LGBTQ individuals and other patients seeking medical treatment. For example, one advocate described the formation of the Division as “the use of

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<sup>10</sup> See HHS Takes Major Actions to Protect Conscience Rights and Life, HHS.GOV (Jan. 19, 2018), <https://www.hhs.gov/about/news/2018/01/19/hhs-takes-major-actions-protect-conscience-rights-and-life.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

<sup>13</sup> *Id.*

<sup>14</sup> Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

<sup>15</sup> Heidi Przybyla, *Notes, emails reveal Trump appointees’ war to end HHS teen pregnancy program*, NBC NEWS (Mar. 20, 2018), <https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686> (“The Trump administration’s abrupt cancellation of a federal program to prevent teen pregnancy last year was directed by political appointees over the objections of career experts in the Department of Health and Human Services, which administers the program, according to internal notes and emails obtained by NBC News.”); Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735> (“The political leaders’ moves also worry career agency staff, who say that important decisions about controversial issues like abortion, contraception and transgender care are increasingly being kept secret at the nation’s largest government agency.”).

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religion to hurt people because you disapprove of who they are”<sup>16</sup> and a medical researcher warned that the new Division and Proposed Rule could reverse advances recently made that have improved health outcomes for LGBT individuals: “It’s only a matter of time before all the gains made under the Obama administration are reversed under the Trump administration, for purposes that have nothing to do with public health and have everything to do with politics.”<sup>17</sup>

As a result, advocates and career employees at HHS have expressed concern that the Trump administration’s actions are aimed at benefiting a specific set of religious and moral beliefs above all others. Said one longtime HHS staffer: “It’s supposed to be the faith-based partnership center, not the Christian-based partnership center.”<sup>18</sup> Advocacy groups have highlighted the administration’s focus “on recognizing one set of religious beliefs” and efforts to “redefine religious freedom to impose one set of ultraconservative beliefs on all Americans.”<sup>19</sup>

The lack of public information regarding the role of religious activists within HHS and the uncertainty among experts, advocates, and the public about the decision-making process at HHS regarding LGBTQ matters has created concern among the public. Accordingly, a FOIA request is necessary to shed light on the influence of these religious activists in the development and creation of the new Division, Proposed Rule, and policies pertaining to LGBTQ issues and people. The requested disclosures would provide much-needed clarity to the public and those who serve it regarding the influence of religious activists over recent HHS actions and HHS’s decisions with regards to LGBTQ health care.

### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), Lambda Legal requests a waiver of fees associated with processing this request for records.<sup>20</sup> The requested disclosures “would shed light on the operations or activities of the government,” and the subject of the request has a “direct and clear” connection thereto.<sup>21</sup> However, we are willing to pay \$500 without receiving an estimate of costs in order to expedite this request.

As discussed, the disclosures pertain to the decision-making processes used by HHS in setting policies of national importance, particularly for LGBTQ individuals. The requested disclosures thus would be “meaningfully informative about government operations or activities.”<sup>22</sup> There is

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<sup>16</sup> Dan Diamond & Jennifer Haberkorn, *Trump to overhaul HHS office, shield health workers with moral objections*, POLITICO (Jan. 16, 2018), <https://www.politico.com/story/2018/01/16/conscience-abortion-transgender-patients-health-care-289542>.

<sup>17</sup> Dan Diamond, *Trump administration dismantles LGBT-friendly policies*, POLITICO (Feb. 19, 2018), <https://www.politico.com/story/2018/02/19/trump-lgbt-rights-discrimination-353774>.

<sup>18</sup> Dan Diamond, *The religious activists on the rise inside Trump’s health department*, POLITICO (Jan. 22, 2018), <https://www.politico.com/story/2018/01/22/trump-religious-activists-hhs-351735>.

<sup>19</sup> *Id.*

<sup>20</sup> See also 45 C.F.R. § 5.54(b).

<sup>21</sup> 45 C.F.R. § 5.54(b)(1).

<sup>22</sup> 45 C.F.R. § 5.54(b)(2)(i).

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little publically-available information regarding the individuals involved in HHS's decisions pertaining to LGBTQ matters, including HHS's decision to create the new its new "Conscience and Religious Freedom Division" and to promulgate the Proposed Rule.

The requested disclosures would "contribute to the understanding of a reasonably broad audience of persons interested in the subject."<sup>23</sup> The creation of a new unit within HHS dedicated to promoting religious exemptions would have wide-ranging effects for LGBTQ people, people living with HIV, those seeking access to reproductive healthcare, and countless other constituencies. The ability to access medically-necessary care on a non-discriminatory basis is of particular concern to the communities that Lambda Legal represents. Indeed, according to a first-of-its-kind survey published by Lambda Legal in 2010, almost 56 percent of lesbian, gay, or bisexual respondents and 70 percent of transgender and gender-nonconforming respondents reported experiencing discrimination while attempting to access medical care.<sup>24</sup>

Lambda Legal has the ability and intent "to effectively convey [the requested] information to the public."<sup>25</sup> Educating the public about issues affecting LGBTQ people and people living with HIV and publishing information about the rights of those constituencies are among Lambda Legal's primary purposes. According to its 2015 Annual Report, Lambda legal organized over 200 community education events and trainings in that fiscal year, with 15,000 estimated participants. Lambda Legal also had over 750,000 unique visitors to its website, and spent over \$6.4 million on educational programming.

Finally, the requested disclosures are not "primarily in the commercial interest of the requester."<sup>26</sup> Lambda Legal is a tax-exempt, not-for-profit legal, education, and charitable organization organized under section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in the requested disclosures.

If you decide not to grant our request for a fee waiver and the costs of production exceed \$500, please contact us immediately upon making such a determination so that we can discuss arrangements.

## **Conclusion**

We share a common mission to promote transparency in government. We look forward to working with HHS on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Erin Kelley at [ekelley@lambdalegal.org](mailto:ekelley@lambdalegal.org) or (212) 809-8585.

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<sup>23</sup> 45 C.F.R. § 5.54(b)(2)(ii).

<sup>24</sup> *When Health Care Isn't Caring: Lambda Legal's Survey of Survey of Discrimination Against LGBT People and People Living with HIV*, LAMBDA LEGAL, at 5 (2010), [www.lambdalegal.org/health-care-report](http://www.lambdalegal.org/health-care-report).

<sup>25</sup> 45 C.F.R. § 5.54(b)(2)(ii).

<sup>26</sup> 45 C.F.R. § 5.54(b)(3).

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Thank you for your prompt response to this request. We look forward to your determination of this request within twenty business days.<sup>27</sup>

Sincerely,

LAMBDA LEGAL DEFENSE  
AND EDUCATION FUND, INC.

/s/ Omar Gonzalez-Pagan  
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<sup>27</sup> 5 U.S.C. § 552(a)(6)(A).